Solar International Shipping Agency, Inc., and Ship Clerks Association Local 34, International Longshore and Warehouse Union, AFL-CIO, Petitioner. Case 20-RC-17464

> December 31, 1998 ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

By letter dated November 6, 1998, the Employer requested special permission to appeal the Hearing Officer's ruling in the above case that the Region would pay for interpreting the testimony of the Employer's witnesses only to the extent they gave testimony that is relevant to the issues and that the Region determines is needed to complete the record. The Employer contends that the Hearing Officer's ruling is unfair and conflicts with the Agency's policy regarding the payment of interpreters in representation hearings.

Having duly considered the matter, for the reasons set forth below, we have decided to grant the Employer's request to appeal in order to clarify the Board's position on the payment of interpreters in representation proceedings.

The relevant facts in the instant case are as follows. The primary issue at the hearing was the supervisory status of certain individuals. The parties agreed that at least three witnesses, the Employer's general manager and assistant general manager (admitted managers/supervisors), and the operations manager (one of the disputed individuals), would need a translator if they testified. The Region therefore arranged for a translator proficient in both Mandarin and Cantonese at the rate of \$120 per hour.

The Employer's first witness was the disputed operations manager, and the translator provided by the Region was used for his testimony. However, during the course of the second and third days of hearing, a dispute arose over whether the Region would also provide the interpreter for two other Employer's witnesses, the general manager and assistant general manager, if they were called to testify. The Hearing Officer initially ruled on

the second day that the Region would not provide or pay for an interpreter for their testimony because their own positions were not at issue.

The Employer objected to this ruling, arguing that the issues in the case are what the duties of the disputed individuals are, not what those individuals say their duties are, and the testimony of the general manager and assistant general manager is relevant to those issues. After some further discussion, the Hearing Officer asked whether the Employer would present an "offer of proof of what it is these two witnesses would more specifically testify to." The Employer responded that it would do so if the Union stipulated that three individuals in question are statutory supervisors. The Union did not so stipulate, and no specific "offer of proof" was made.

The following day, the Hearing Officer acknowledged that she may have "misinformed" the parties regarding the Region's position on providing an interpreter. She stated that the Region's position was that it would provide and pay for an interpreter for any Employer witnesses, but only to the extent they testified with respect to the supervisory status of the individuals in issue; that the Region would not provide a translator for any witness to testify about any other issues unless those issues are necessary to complete the record.

The Employer also objected to this ruling, arguing that it was even more "cryptic" than the prior ruling. The Employer argued that the ruling suggested that the translator would translate some questions but not others, and that it left the Employer unsure how to proceed as there may be a multitude of issues the witnesses needed to testify about, including the supervisory issues. The Employer requested that the Region provide something in writing to explain the procedure. The Hearing Officer did not respond on the record to this request, and the Employer subsequently filed the instant special appeal.

Having duly considered the matter, we agree with the Employer that, under the circumstances, some further clarification of the Hearing Officer's ruling would have been helpful. As indicated by the Employer, the General Counsel's long-standing policy has been to provide and pay for interpreters in representation proceedings. This policy was originally implemented in 1978 under then-General Counsel John S. Irving. The policy and the reasons therefor were fully set forth in a July 17, 1978 memorandum to all Regional Offices from then-Associate General Counsel Joseph E. DeSio:

Recent experiences involving foreign language witnesses at representation hearings have necessitated a review of Regional Office practices with respect to the retention and payment of interpreters.

The practice in some Regions has been to arrange and pay for an interpreter in representation hearings only where the Region subpoenaed a witness who could not testify in English. In cases where the Re-

¹ By letter dated November 4, 1998, the Employer also requested special permission to appeal the Regional Director's decision to proceed with the representation hearing notwithstanding that the Petitioner Union had filed two unfair labor practice charges against the Employer alleging violations of Sec. 8(a)(1) and (3) of the Act. We deny the Employer's appeal on that issue as moot. The record indicates that the two unfair labor practice charges were filed on November 2, after the hearing began. Although the Union did not file a request to proceed, the Region did not immediately place the hearing in abeyance. Rather, the Region exercised its discretion to continue with the scheduled hearing while it reviewed the Union's evidence in support of the charges to determine if it presented a prima facie case. See NLRB Casehandling Manual, Sec. 11730.1. Once the Region determined that the evidence did present a prima facie case, it placed the hearing in abeyance. This occurred on November 5, the day after the Respondent sent in its appeal.

gion did not subpoena the foreign language witness, the party seeking the testimony was required to obtain and compensate the interpreter. Other Regions have obtained and paid for the services of an interpreter in any "R" case where the Region or a party wishes to call a foreign language witness to testify. Clearly, there is no uniform policy on this matter in the Agency.

The Agency is mandated to resolve questions concerning representation and is also responsible for resolving objections and challenges to elections. To achieve this goal in cases which require hearing, a complete record must be obtained so that the issues will be properly determined. In many instances foreign language witnesses may provide testimony to assist the Agency in its determination, even though the Regional Offices involved did not subpoena or call the individual to testify at the hearing. Moreover, it is fundamental to the Act that persons covered by the statute be able to resort to, and participate in, its processes without the limitation imposed by language differences. This is particularly significant in representation cases where the Agency is responsible for a complete record.

Accordingly, in future representation case hearings, both pre- and post-election hearings, where foreign language witnesses are required, the Regional Office will secure and pay for interpreter services. It is expected that this policy will be administered so as to obviate unnecessary expense or delay in the processing of petitions. Therefore, during the initial investigation of a representation case, the assigned Agent should be alert to any potential foreign language issue and to inform the parties to apprise the Regional Office promptly of a need for interpreter services.

This policy was subsequently reaffirmed in another memorandum to all Regional Offices from Associate General Counsel DeSio dated November 1, 1990.

We agree with and endorse the foregoing policy. Further, in agreement with the Employer, we find that the policy applied in the instant pre-election representation proceeding and that the Region therefore had an obligation, at least presumptively, to pay for an interpreter for the Employer's witnesses at the hearing.²

We recognize that in these times of scarce resources the Agency must take all reasonable steps to reduce its costs, including interpreter costs. There are a number of appropriate ways that the Regions may do this. For example, where it is unclear whether a witness' testimony would be relevant or necessary, and the witness would require a translator if called to testify, we believe it would be appropriate for the Region or the hearing officer to request the party that intends to call the non-English speaking witness to identify, either through a formal offer of proof or any other method satisfactory to the Region or the hearing officer, the nature of the testimony to be given by the witness.³ The Region would then be able to determine in advance (i.e., prior to retaining an interpreter) whether that testimony will be probative of the issues and assist the Region's investigation.⁴ Once the witness has been called, the hearing officer may also properly exercise his/her discretion to limit the parties' examination of the witness to exclude irrelevant and overcumulative material. See NLRB Casehandling Manual, Sec. 11184.1.

As indicated above, in the instant case the Employer stated on both the second and third days of hearing that the testimony of the general manager and assistant general manager would relate, at least in part, to the supervisory status of the disputed individuals. The Employer, however, declined to provide a more specific offer of proof regarding their testimony in response to the Hearing Officer's request on the second day of hearing.

We do not pass on whether a more specific showing was required. As indicated above, we will generally leave it to the discretion of the Region or hearing officer to determine whether a prior showing should be made and how specific that showing should be. Further, it is unclear from the record in this case whether the Region or the Hearing Officer relied on the Employer's failure to make a more specific offer of proof in making their ruling regarding the provision of interpreter services. The Hearing Officer made no mention of the Employer's failure to do so on the third day of hearing when she corrected her prior ruling. Finally, even assuming arguendo that a more specific showing would not be required before one of the two Employer's witnesses testifies, it may be that the Region or Hearing Officer will decide that a more specific showing is required before the second witness testifies.

² In this regard, we agree with the Employer that the Board's recent decisions in *George Joseph Siding*, 325 NLRB 252 (1998); and *Domsey Trading Corp.*, 325 NLRB 429 (1998), are not controlling because they concerned the payment of interpreters in adversarial unfair labor practice proceedings. By contrast, a hearing in a representation proceeding "is nonadversary in character [and] is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case." Sec. 101.20(c) of the Board's Statements of Procedure.

³ This inquiry could properly be made by the assigned Board agent during the initial investigation of the representation case as well as by the hearing officer at the subsequent hearing. As indicated in the 1978 DeSio memorandum, addressing such issues during the initial investigation may avoid unnecessary expense or delay in processing the petition.

⁴ If the party declines to identify the nature of the witness' testimony, the Region could properly decline to retain an interpreter for that witness' testimony. The party would then have two choices: either forego calling the witness or retain an interpreter for the witness itself.

Accordingly, we will leave it to the Region and Hearing Officer to determine in the first instance on remand whether a more specific showing is required in this case

prior to retaining the interpreter for the Employer's witnesses.